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No. 96-778

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,
Petitioner,
v.
KANSAS PIPELINE PARTNERSHIP,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF IN OPPOSITION OF RESPONDENT KANSAS PIPELINE PARTNERSHIP

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to hear Petitioner's claim, which was neither passed upon by, nor properly presented to, the Kansas courts?

2. Assuming this Court has jurisdiction, should it grant certiorari to consider a claim, repeatedly waived below, to correct the alleged denial of a state procedural right, when (a) the alleged right does not exist under Kansas law, (b) even if it did, long and well-established precedent of this Court establishes that Petitioner does not have the constitutionally-protected "property interest" it claims; and (c) Petitioner received far more process than was required in any event?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Kansas Pipeline Partnership states that it is a general partnership and has no corporate parents or subsidiaries that have issued shares to the public.

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BRIEF IN OPPOSITION OF RESPONDENT KANSAS PIPELINE PARTNERSHIP

Respondent Kansas Pipeline Partnership ("KPP") respectfully submits this brief in opposition to the petition filed by Williams Natural Gas Company ("WNG") for a writ of certiorari to review a decision of the Supreme Court of the State of Kansas. The decision is unreported and reprinted as Appendix A to WNG's Petition.

COUNTERSTATEMENT AS TO JURISDICTION

This Court lacks jurisdiction over the Petition under 28 U.S.C. § 1257, the statute invoked by Petitioner WNG, because the question WNG presents was neither passed on nor properly presented to the Kansas courts. The Petition also seeks a writ directed to the wrong court.

COUNTERSTATEMENT OF THE CASE

Kansas, like a number of other states, has established a statutory procedure for the filing and approval of utility

rates. That procedure is designed to protect against "regulatory lag"—undue delays in the regulatory process caused by, among other things, competitors seeking to turn the regulatory process to their own advantage. Kan. Stat. Ann. § 66-117 grants the Kansas Corporation Commission ("Commission" or "KCC") the power to suspend the effectiveness of proposed utility rates or contracts, but strictly limits that power by providing a maximum period of suspension. Proposed changes are "deemed approved" if the Commission fails to decide the matter within that period. The Kansas legislature expressly refused to give the KCC the power to order open-ended or indefinite suspensions. Kansas law also provides for expedited appeals of KCC orders.

In March 1995, KPP filed five proposed natural gas contracts with the KCC pursuant to § 66-117. Timely approval of the contracts was critical to KPP, as the contracts contained deadlines for performance and required significant facilities construction. After extensive delays, many caused by WNG, and a comprehensive hearing in which WNG participated fully, the KCC declined to rule within the statutory period. Although the KCC (which opposed enactment of § 66-117) refused to treat the contracts as deemed approved, its action was reversed on appeal and the contracts finally were found to have become effective.

WNG then filed an untimely constitutional challenge to the statute, a challenge WNG concedes the Kansas courts did not consider. WNG Pet. at 4. There is no support in the decisions of this Court for WNG's constitutional claim. Indeed, the wisdom of the Kansas statute is demonstrated by WNG's history of bringing abusive litigation against KPP to protect its monopoly, leading a federal agency to conclude that WNG had "used incongruous positions, ill-defined 'questions' and innuendo . . . in an apparent effort to eliminate competition from a new intrastate pipeline." *Phenix Transmission Co.*, 32 Fed. Energy

Reg. Comm'n Rep. (CCH) ¶ 61,096, at 61,264 (July 23, 1985).[1]

A. The Kansas Statutory Scheme

Kansas requires a utility or common carrier to file with the KCC any changes to the rates, charges, rules or practices pertaining to its service at least thirty days before they become effective. After filing,

> the commission, either upon complaint or on its own motion, *may* give notice and hold a hearing upon such proposed changes. Pending such hearing, the commission *may* suspend the operation of such schedule and defer the effective date of such change . . .[2]

The statute plainly states that the KCC is not required to hold a hearing or to suspend the proposed changes. The KCC's suspension power is also expressly qualified to assure its timely action on utility rate filings:

> The commission shall not delay the effective date of the proposed change . . . more than 240 days beyond the date the public utility or common carrier filed its application requesting the proposed change.[3]

The statute enforces this limitation by providing, subject to certain exceptions not applicable here, that if no final order issues within the 240 day period "the schedule shall be *deemed approved* by the commission and the proposed change shall be effective immediately . . . ." Kan. Stat. Ann. § 66-117(b) (emphasis supplied).

The Kansas Court of Appeals reviewed below the legislative history of the statute and confirmed that its purpose "was to adopt time limits to remedy delays utilities had

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[1] KPP is a successor to Phenix. *See* note 8, *infra*.

[2] Kan. Stat. Ann. § 66-117(b) (emphasis supplied). The statute is at App. H to WNG's Petition.

[3] *Id.*

experienced with the KCC." *Kansas Pipeline Partnership v. State Corp. Comm'n*, 916 P.2d 76, 83 (Kan. Ct. App. 1996). When it enacted the statute in 1980, the legislature had before it evidence concerning the harms of "regulatory lag." The Kansas Court of Appeals found that "the legislature was intent on forcing the KCC to act within prescribed time limits." *Id.* at 85.[4] Although the court recognized that a "deemed approval" could moot many hours of staff work and legal and technical analysis expended in connection with a hearing, it found that the

> legislative history makes clear that was *precisely an anticipated result* should the KCC fail to make a final decision within the time limits provided by [Kan. Stat. Ann.] 66-117(b).[5]

WNG argues to this Court that Kansas law gave it a right to a hearing, WNG Pet. at 5, 7-8, but the statutory language expressly provides that hearings are discretionary. WNG also argues that it had a "right to a determination on the merits," *id.*, but, as the Court of Appeals noted, the KCC's failure to make such a determination is "precisely an anticipated result" of the Kansas statute.

Since the statute allows the FCC to suspend rates in its discretion, that suspension cannot be unlimited. A 240-day period was the reasonable balance struck by the legislature.[6] Kansas' expedited appeals process for utility rate

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[4] The KCC strongly opposed any "absolute time limits," but never suggested they were unconstitutional. Like many decision-makers, the KCC preferred to have no time limits imposed on it, but the legislature rejected the KCC's position. The KCC has filed in support of WNG's Petition, seeking to accomplish here what it could not accomplish in the Kansas legislature. The KCC's brief filing adds nothing whatsoever to WNG's Petition.

[5] 916 P.2d at 85 (emphasis supplied).

[6] The Court of Appeals noted that some proposed versions of the legislation that became § 66-117 provided a shorter 180-day period. *Id.* at 83. In extending the period to 240 days, the Kansas House Ways & Means Committee expressly rejected a proposal

matters further demonstrates its interest in protecting utilities from regulatory delays.[7]

The Kansas procedure is not unusual. The Court of Appeals opinion noted testimony before the Kansas legislature that "time limits were not new and had been adopted by numerous regulatory agencies across the country." 916 P.2d at 83. WNG's own Petition cites numerous similar state statutes. WNG Pet. at 15-18. Nonetheless, the Petition fails to cite a single decision holding, or even suggesting, that such a "deemed approval" statute raises any constitutional problems. WNG thus asks that this Court, contrary to its practice and to common sense, reach out to unsettle currently settled, and indeed long-settled and noncontroversial, law.

B. The Proceedings in this Case

1. *The Competitive Backdrop*

KPP is a Commission-certificated natural gas pipeline which sells and transports natural gas delivered in Kansas City, Wichita, and other cities in Kansas.[8] The KPP contracts at issue were with Western Resources, Inc. ("WRI"),

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that would have "given the KCC more flexibility in deciding cases under the new time limits." *Id.* at 85.

[7] Appeals are taken directly to the Kansas Court of Appeals, bypassing district court review. Kan. Stat. Ann. § 66-118a(b). Under Kan. Sup. Ct. R. 9.02, the appeals court has 120 days to issue a final order. If the court of appeals does not act, the utility may collect the full amount of the rates sought, subject to a bonding requirement with respect to rates disapproved by the KCC. Kan. Stat. Ann. §§ 66-118g, 118h. Only the utility may waive the 120-day time limit. Kan. Sup. Ct. R. 9.02.

[8] KPP is the successor to Kansas Pipeline Company, L.P. ("KPCLP") which was certificated as a public utility by the KCC in 1985. In 1995, the operations of Kansas Natural Partnership, a KPP affiliate and successor to Phenix Transmission Company ("Phenix"), were combined into KPP's operations. References to KPP and WNG herein include, as appropriate, their predcessor entities.

which distributes natural gas to virtually the entire Kansas retail market.

At the time KPP's applications were filed, approximately 90% of the natural gas used in northeastern Kansas was supplied by Petitioner WNG, the largest interstate pipeline in the country. (6 Rec. 178.)[9] Until KPP's certification in 1985, WNG had been for many years the sole supplier of natural gas for distribution in metropolitan Kansas City and most other areas of Kansas. (8 Rec. 193-94.) Under the KPP/WRI contracts, the share of natural gas in eastern Kansas supplied by KPP would rise from about 10% to about 30%. (6 Rec. 185; 8 Rec. 194.)

WNG's Petition to this Court is merely the latest episode in a pattern of litigation brought by WNG over the past decade to stifle KPP's competitive entry into markets WNG dominates. (*See* 8 Rec. 215-17.) Although WNG describes its interest in this matter as that of "an interested competitor of KPP," WNG Pet. at 7, WNG is not a party to the contracts at issue; nor does it supply, purchase, or transport the natural gas to be sold under the contracts. WNG's interest is solely to protect itself against any competitive threat to its monopoly. WNG has often benefited from the delay and the chilling effects engendered by its use of proceedings to stifle competition from KPP, the very problem the Kansas statute at issue addresses.

For example, WNG opposed the KCC's certifications of KPP's predecessor companies (KPCLP and Phenix), then left its appeals of these decisions open for nearly three years but declined to prosecute them, keeping KPP's certificates under a legal cloud.[10] WNG also filed meritless

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[9] Citations are to the record filed with the Kansas Court of Appeals.

[10] *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, No. 85-C-5535 (Johnson County Dist. Ct. Oct. 18, 1988); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, No. 85-CU-1037 (Shawnee County Dist. Ct. Oct. 17, 1988).

and protracted litigation to prevent KPP from selling gas to WRI's predecessor, allowing the litigation to languish so long that the federal court, "weary of delay, wary of the potential for misuse of litigation, and desirous of achieving some progress in the case," [11] dismissed it for lack of prosecution.[12] During this period WRI repeatedly refused to deal with KPP, citing the threat of litigation from WNG.[13]

WNG also litigated extensively at the Federal Energy Regulatory Commission ("FERC") to disrupt KPP's operations, seeking disapproval of rate applications and denial of Natural Gas Act ("NGA") applications to provide interstate pipeline service. In one of the NGA matter, FERC noted that "[t]he harm WNG complains of, if it occurs at all, will be the result of competition in the transportation market . . . . We see no reason to shield an interstate pipeline, such as WNG, from similar competition." *Riverside Pipeline Co., L.P.*, 48 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,309, at 62,016 (Sept. 18, 1989).

In both NGA matters, FERC denied WNG's requests for an evidentiary hearing. Moreover, in the rate case FERC rebuked at length the anticompetitive misuse of the litigation process by WNG (then known as Northwest Central):

> Although the Commission encourages participation by interested parties in proceedings to establish rates of intrastate pipelines, *it looks with disfavor on Northwest Central's apparent strategy in this proceeding to bar Phenix's entry into the NGPA section 311*

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[11] *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, No. 86-1801 (D. Kan. July 21, 1988) (order to show cause) at 4.

[12] *Northwest Cent. Pipeline Corp. v. Corp. Comm'n*, No. 86-1801 (D. Kan. Sept. 7, 1988) (order dismissing complaint).

[13] This Court has recognized that sham litigation can be used for anticompetitive purposes. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

> *market as a potential competitor.* Far from aiding the Commission's determination of fair and equitable rates, Northwest Central has used incongruous positions, ill-defined "questions," and innuendo as attempts to persuade us to disapprove Phenix's rate. Simply put, Northwest Central has not proposed a different rate or appropriate rate methodologies; it has tried only to negate Phenix's presentation *in an apparent effort to eliminate competition from a new intrastate pipeline.*[14]

2. *The KCC's Consideration of the KPP/WRI Contracts*

The KPP/WRI contracts are time-sensitive, as they contain strict deadlines and provide they will become null and void if KPP does not give the required notices to commence performance in a timely manner. (1 Rec. 1, 18, 36, 54, 69-70.) Moreover, KPP must construct extensive facilities. (*See* 1 Rec. 70-71.) The Commission's delay in approving the contracts has cost KPP millions of dollars. (1 Rec. 72, 75.)

In April, 1995, the KCC issued Suspension Orders under Kan. Stat. Ann. § 66-117 suspending the effectiveness of the contracts until September 27, 1995 so the KCC could conduct a "full investigation of this matter, which may result in a hearing." (1 Rec. 143a, 143c.)[15] WNG had already filed a Petition to Intervene, stating its "direct interest" in its entirety as follows:

> Because of the nature of the business conducted by WNG and the affect [sic] this proposal may have in the industry, WNG has a direct interest in these proceedings and may be adversely affected by any order of this Commission. (1 Rec. 117.)

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[14] 32 Fed. Energy Reg. Comm'n Rep. (CCH) at 61,263-64 (emphasis supplied).

[15] WNG and WRI had entered into a 20-year contract for volumes many times greater than the volumes in the KPP/WRI contracts; yet the KCC required no hearing. (1 Rec. 193.)

WNG's Petition did not allege anything other than a generalized interest in the proceeding. WNG was allowed to intervene without making any specific showing. WNG had actual notice that KPP and the KCC were treating the applications as governed by Kan. Stat. Ann. § 66-117,[16] the only statute that provided the KCC with authority to suspend the contracts.[17]

In an action that KPP noted "appears to be totally unprecedented in the history of the state of Kansas" (1 Rec. 192), the KCC set the applications for hearing. KPP repeatedly informed the KCC that delays were causing KPP unreasonable and undue hardship, and irreparable harm, due to the time-sentitive nature of the contracts. (1 Rec. 195, 347; 2 Rec. 32-33, 113, 138, 212; 4 Rec. 173, 197-98; 27 Rec. 14, 18-20, 175-76.) Nonetheless, the KCC repeatedly delayed the hearing, which, as a result, did not begin until August 21, 1995. (2 Rec. 169; 5 Rec. 7-9.)

WNG also repeatedly sought to delay the proceedings, asking for hearing postponements to dates in September and October of 1995. (1 Rec. 287; 4 Rec. 165.) It moved to vacate the procedural schedule completely (1 Rec. 284), and to stay the proceedings indefinitely on the ground that FERC might, in response to a motion filed by WNG, assert jurisdiction over the contracts at issue. (1 Rec. 298-99.) WNG also moved the KCC at least twice to dismiss the applications outright. (1 Rec. 310; 27 Rec. 60.)

WNG participated fully in the KCC hearing, which lasted over two weeks. WNG called seven witnesses and

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[16] For example, WNG noted in a pleading filed May 30, 1995, that "KPP states that it has filed these contracts under Kan. Stat. Ann. 66-117" (1 Rec. 282), and discussed the statute's requirements at length.

[17] At oral argument before the Kansas Court of Appeals, the KCC "acknowledged that 66-117 is the only statute permitting suspension of an effective date . . . ." 916 P.2d at 81.

had the opportunity to cross examine all other witnesses. Although WNG has asserted to this Court that the KCC would not have approved the contracts had it issued a decision, WNG Pet. at 13, nothing in the record supports WNG's speculation as to how the KCC would have ruled. KPP presented abundant evidence to support a KCC finding that the contracts would advance competition and decrease costs to ratepayers.[18]

Post hearing briefing was concluded October 6, 1995. The 240-day period established by Kan. Stat. Ann. § 66-117 expired November 29, 1995, nearly two months after the hearing was closed. In enacting § 66-117 the legislature evidenced its belief that 20 days was sufficient time after the conclusion of a hearing for the KCC to issue a decision; the KCC in fact had 53 days.[19]

Nonetheless, the KCC issued no decision. Rather, it first temporarily, then indefinitely, stayed the proceeding on the basis of a November 2, 1995 FERC order asserting that KPP was an interstate pipeline subject to FERC jurisdiction, an order issued in part at WNG's request. The KCC declined to act even after FERC stayed its order and confirmed that KPP remained subject to KCC regulation of is rates and services "until the effectiveness of . . . [FERC's] assertion of jurisdiction . . . ." *KansOk Partner-*

[18] For example, KPP demonstrated that (1) under three of the contracts at issue services would be priced at the *lower of* WNG's equivalent rate or KPP's existing KCC-approved cost of service based rate (1 Rec. 15-17, 32-35, 50-53, 152-6, 152-10; 11 Rec. 2643-6, 2643-8); (2) the already-existing contract would continue at KCC-approved rates for 5 years and then drop to the lower of those rates or the WNG price (1 Rec. 152-7; 11 Rec. 2643-9 to 2643-10), and (3) the remaining contract provided a flat rate consistent with KPP's KCC-approved terms and conditions (1 Rec. 152-38), and less expensive than the existing (WNG) alternative. (7 Rec. 259, 263-64, 270-75, 306, 326; 26 Rec. 47-52.)

[19] Section 66-117 provides that for hearings ongoing at the end of the 240-day period, the period may be extended to 20 days after the end of the hearing.

ship v. Kansas Pipeline Operating Co., 73 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,293, at 61,817 (Dec. 8, 1995).[20]

In challenging the KCC stay, KPP expressly noted that the KCC was required by § 66-117 to enter a final order by November 29, 1995 "or the contracts will be deemed approved." (27 Rec. 13.) KPP again advised the KCC of the time-sensitive nature of the contracts. (27 Rec. 18-19.) WNG expressly acknowledged the "potential risk that the subject contracts might be 'deemed approved' by operation of law if the Commission does not issue a final order on the pending applications before expiration of the 240-day period prescribed by K.S.A. 66-117(b)." (27 Rec. 4.) To eliminate the "unpalatable possibility that the proposed contracts may become effective by operation of law after November 27 [sic], 1995," WNG urged the KCC to dismiss the applications or to decide them on the merits. (27 Rec. 60.) At no time did WNG argue to the KCC that application of the deemed approval provisions of § 66-117 would be unconstitutional, even though the statute's application was squarely at issue before the KCC and WNG was well aware of its consequences.

3. *The Appeals to the Kansas Courts*

After unsuccessfully moving for reconsideration of the KCC's stay order, which was considered a final order by the Kansas courts, KPP appealed on the ground that the contracts should have been "deemed approved" under Kan. Stat. Ann. § 66-117. WNG intervened in the appeal, but did not assert on brief that § 66-117 was unconstitutional, or that application of the "deemed approval" provisions of the statute would violate WNG's rights under the Due Process Clause. Nor did WNG file a cross-appeal

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[20] FERC has still not assumed jurisdiction over KPP, although a decision on KPP's petition for rehearing is expected shortly.

raising its constitutional claims, or preserving any claims with respect to the conduct of the KCC hearing itself.

The Kansas Court of Appeals reversed the Commission. The court held that the "legislature was intent on forcing the KCC to act within the prescribed time limits," 916 P.2d at 85, and that the KCC's failure to issue a final order within the 240-day period required that the contracts be deemed approved by operation of law. The court rejected the KCC's contention that the 240-day period was properly restarted, finding that "under the peculiar facts of this case," KCC was precluded from restarting the clock by the undisputed "failure of anyone to file an amendment to the application." *Id.* at 84-85.

WNG moved for rehearing en banc before the Kansas Court of Appeals, raising for the first time the assertion that Kan. Stat. Ann. § 66-117 was unconstitutional. The motion was denied without opinion. *See* App. A. WNG then petitioned the Supreme Court of Kansas for review; that petition was also denied without opinion. WNG Pet. App. A.

SUMMARY OF REASONS FOR DENYING THE WRIT

This Court lacks jurisdiction to decide whether Kan. Stat. Ann. § 66-117 is unconstitutional because WNG repeatedly failed to present the issue properly for consideration by the Kansas courts. In any event, WNG, which benefited from the statute and thus cannot be heard to challenge it, has wholly failed to show "compelling reasons" for this Court to take the case. WNG seeks a ruling that its procedural rights under Kansas law were violated when KPP's contracts were deemed approved by operation of law without a "determination on the merits." This Court has consistently refused to hear claims that allege misapplication of state law. Nor does WNG even attempt to identify any unsettled issue of law or conflict among the lower courts concerning such "deemed ap-

proval" provisions, which many states have adopted. WNG cites no case even questioning the constitutionality of such statutes. Moreover, since FERC has recently announced it may assert jurisdiction over the KPP contracts at issue, the matter could soon well be moot.

WNG's "due process" claim is without merit. Under Kansas law, WNG had no right to a hearing or a "decision on the merits." WNG merely had a procedural privilege to intervene, which Kansas liberally grants and can limit at any time. Moreover, under long-established precedent of this Court, no constitutionally-protected interest of WNG was implicated. WNG had no protected property interest in the rates to be charged under KPP's contracts or in its "right to intervene" in the Kansas proceeding. Nonetheless, WNG participated at length in the hearing and did its best to delay any conclusion to the matter. Its Petition should be denied.

REASONS FOR DENYING THE WRIT

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR WNG'S PETITION

This Court does not have jurisdiction to review the constitutional issue raised in WNG's Petition because it was not properly raised in, or passed upon by, the Kansas courts. WNG concedes that it first raised this constitutional challenge in its Petition for Rehearing to the Kansas Court of Appeals, and that the Kansas courts did not address the constitutional argument. WNG Pet. at 4.

WNG bears the burden of showing that it properly raised the constitutional issue below. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). WNG must show that the Kansas courts "were apprised of

the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981).

WNG has not met, and cannot meet, that burden. The Kansas Supreme Court will not review a constitutional challenge if the issue was not raised below or briefed as an issue on appeal, following a "long-time rule that when constitutional grounds are asserted for the first time on appeal, they are not properly before us for review." *Kansas v. Coffman*, 925 P.2d 419, 421 (Kan. 1996). The Kansas Supreme Court also will not consider issues raised for the first time in motions for rehearing.[21]

In *Stembridge v. Georgia*, 343 U.S. 541 (1952), this Court declined to review a constitutional claim because, contrary to the requirements of state law, the issue was raised for the first time in a petition for rehearing addressed to the state intermediate appellate court. The later refusal by the state's highest court, without opinion, to hear the case precluded review by this Court because it was "apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for rehearing in the Court of Appeals." *Id.* at 547. Review of WNG's Petition is likewise precluded.

A. The Kansas Supreme Court Necessarily Determined that WNG Did Not Properly Present Its Constitutional Issue

WNG sought review in the Kansas Supreme Court as a matter of right, claiming that the Court of Appeals' decision violated its constitutional rights. WNG Pet. App.

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[21] *See Pizel v. Zuspann*, 803 P.2d 205 (Kan. 1990) (declining to consider issue raised for the first time on motion for rehearing); *Denver Nat'l Bank v. State Comm'n of Revenue & Taxation*, 279 P.2d 257, 260-61 (Kan. 1955) (same).

I at 3-4. In denying the appeal,[22] the Kansas Supreme Court necessarily determined that the constitutional issue did not arise for the first time as a result of the Court of Appeals' decision, and should have been raised earlier.[23]

WNG had numerous opportunities to raise its constitutional challenges earlier. The "deemed approved" provision of § 66-117(b) was squarely at issue before the KCC no later than November 14, 1995, when KPP asserted that its requests would be deemed approved if a final decision were not issued by November 29, 1995. The Kansas Court of Appeals defined the "core question" before it as whether the KPP/WRI contracts were "deemed approved" by operation of law, 916 P.2d at 81, but WNG's appeal brief raised no constitutional problem with the statute.[24] WNG did not raise its constitutional claim until rehearing, the kind of tactic the Kansas Supreme Court has stated "smacks of trial by ambush." *McVay v. Rich*, 874 P.2d 641, 647 (Kan. 1994).

B. WNG Waived the Constitutional Issue It Now Presents

Kansas expressly provides that only those issues presented to the KCC in an application for a rehearing may

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[22] Because the Kansas Supreme Court's denial of WNG's petition for review was discretionary, WNG's Petition for Certiorari should have sought a writ directed to the Kansas Court of Appeals. *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) (intermediate court of appeals is "highest court of the State" under 28 U.S.C. § 1257 if state supreme court denies discretionary review).

[23] Kan. Sup. Ct. R. 8.03(e)(1) provides in relevant part that "any party may appeal as a matter of right from a final decision of the Court of Appeals in any case in which a question under the Constitution of either the United States or the State of Kansas arises for the first time as a result of the decision of the Court of Appeals."

[24] *See Plummer Dev., Inc. v. Prairie State Bank*, 809 P.2d 1216 (Kan. 1991) (issues not briefed are waived or abandoned).

be relied upon in a later court proceeding.[25] WNG's so-called constitutional issue was not raised in a petition for rehearing to the KCC and so was not properly before the Kansas courts. *See Peoples Natural Gas Div. v. State Corp. Comm'n*, 644 P.2d 999 (Kan. Ct. App. 1982) (statute mandates that issues subject to judicial review must be found in specific allegations set forth in an application for rehearing). It is thus not properly before this Court.

Moreover, WNG waived its appeal of the constitutional issue because it failed to preserve it through a notice of cross-appeal to the Kansas Court of Appeals. That court held such a cross-appeal required in *In re News Publishing Co.*, 743 P.2d 559 (Kan. Ct. App. 1987), an appeal from an agency decision in favor of a taxpayer. Although it affirmed the agency, the court of appeals declined to address the taxpayer's constitutional claim because the taxpayer had "filed no notice of cross-appeal to preserve the issue . . . for decision by this court." *Id.* at 563.[26]

II. THIS COURT DOES NOT REVIEW CLAIMS THAT STATE LAW HAS BEEN MISAPPLIED

Although WNG attempts to dress its claim in constitutional clothing, its real complaint is that state procedures

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[25] Kan. Stat. Ann. § 66-118b ("No cause of action arising out of any order or decision of the commission shall accrue in any court to any party unless such party shall petition for reconsideration . . . . *No party shall, in any court, urge or rely upon any ground not set forth in the petition.*") (emphasis supplied).

[26] WNG also raises the odd argument that the "deemed approval" statute removed its right to appeal the KCC's denial of its motion to dismiss the applications. WNG Pet. at 12. But WNG never even attempted to file such an appeal, and thus waived it. *See* Kan. Stat. Ann. §§ 60-2102(a)(4), 60-2103(h) (appellee desiring review of any act or ruling from the beginning of the proceeding must file a notice of cross-appeal within twenty days of service of the notice of appeal). WNG may not now criticize the statute for "depriving" it of an appeal it waived by its own actions.

were not applied so as to derail KPP's applications. Indeed, WNG expressly asserts that the state law was misapplied, WNG Pet. at 3, 4 n.4, and alleges the statute is unconstitutional "as applied." *Id.* at 4. Whatever that argument may mean, this Court has always rejected claims that mere deprivations of state procedural rights (even those that could be identified), violate the Fourteenth Amendment:

> We have said time and again that the Fourteenth Amendment does not "assure uniformity of judicial decisions [or] immunity from judicial error." Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.[27]

Were this Court to accept WNG's theory that some amorphous procedural right constitutes a "property" interest because it allegedly is state-created, WNG Pet. at 7, the Court would be required to hear, as a constitutional matter, a host of claims regarding every alleged denial of a state procedural "right". This Court has consistently resisted such wholesale intrusions into state affairs. *See Gryger v. Burke*, 334 U.S. 728, 731 (1948) ("mere error of state law" not a denial of due process).

III. THIS CASE DOES NOT MEET THE COURT'S PRUDENTIAL STANDARDS FOR THE GRANT OF CERTIORARI

A. No Unsettled Questions of Law Are Presented

In many of the cases in which this Court grants certiorari "there is a real and embarrassing conflict of opinion and authority" in the lower courts. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). WNG identifies no split of authority in the lower courts; nor does its Petition give any other indication that it presents a substantial federal constitutional question. This Court has

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[27] *Beck v. Washington*, 369 U.S. 541, 554-55 (1962) (citations omitted).

no need to provide "guidance" in this case to resolve unsettled issues of law. To the contrary, long-standing and well-established precedent easily disposes of WNG's claim.

B. WNG Could Not Obtain Relief Even if Its Constitutional Argument Were Valid

1. *WNG May Not Challenge Section 66-117 Because It Received Benefits under that Very Statute*

It is well-settled that one who voluntarily proceeds under a statute and claims benefits conferred by it will not be heard to question its constitutionality in order to avoid its burdens. *Fahey v. Mallonee*, 322 U.S. 245, 255 (1947). *Accord, Leavenworth-Jefferson Elec. Coop., Inc. v. Kansas Corp. Comm'n*, 797 P.2d 874, 878 (Kan. 1990). *Leavenworth* held that a utility was not entitled to challenge a statute as unconstitutional because it had "acquiesced in the acknowledgment, use, and benefit of . . . the statute it question[ed]" by seeking compensation under the same statute. *Id.* at 877. WNG likewise benefited from the statute it now claims is unconstitutional. WNG has submitted numerous pleadings under the authority of the statute seeking delay or dismissal of KPP's applications. In addition, the statute was the basis on which the KCC acted to suspend KPP's contracts, an action WNG urged, and to hold a hearing in which WNG participated fully. WNG may not now be heard to complain that the statute is unconstitutional.

2. *If the Statute Were Declared Unconstitutional, the KCC's Suspension Authority Would be Invalidated as Well, and the KPP Contracts Would Still Be Effective*

As the KCC itself conceded before the Court of Appeals, *see* n.17, *supra*, § 66-117 was the sole source of the KCC's suspension authority. The deemed approval provision of

that statute which WNG now seeks to invalidate is an integral part of that authority. Under Kansas law, where valid and invalid provisions are not separate and independent of each other, but are "so connected and intertwined" that the invalid portion cannot be severed without violating the intent of the legislature, the entire Act must fail. *Thompson v. KFB Ins. Co.*, 850 P.2d 773 (Kan. 1993). A portion of an act can be stricken only " 'if it can be said that the Act would have been passed without the objectionable portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken . . . .' " *Id.* at 782 (*quoting Felten Truck Line v. State Bd. of Tax Appeals*, 327 P.2d 836 (Kan. 1958)).

Since the Kansas legislature made absolutely clear its intent to grant suspension authority *only* subject to strict time limits enforced by the "deemed approval" provision, if the deemed approval provision were declared unconstitutional, the suspension authority should fall with it. Otherwise, the legislature's intent would be thwarted. WNG would thus obtain no relief; the contracts would remain in effect.

C. This Case May Well Be Moot by the Time this Court Could Hear It

This Court reviews issues that are "beyond the academic or the episodic." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). The pending FERC proceeding, which could result in the near future in a confirmation that the KPP contracts at issue are subject to federal jurisdiction and not to the Kansas statutory scheme, threatens to make this entire dispute academic at any time. Indeed, since WNG's Petition was filed, this case has already become moot as to one of the five contracts at issue, which is freely assignable and has been sold to a FERC-regulated pipeline company. WNG's claim that this case presents an issue of "great importance to Kansas

consumers," WNG Pet. at 13, is thus quite misleading. WNG has not shown why this Court's scarce resources should be allocated to this matter. *See* Sup. Ct. R. 10 (certiorari granted only for "compelling reasons").

IV. WNG'S DUE PROCESS CLAIM IS ABSOLUTELY WITHOUT MERIT

A. WNG Does Not Cite a Single Case Questioning the Constitutionality of "Deemed Approval" Statutes

Perhaps the best indication of the lack of merit in its Petition is WNG's failure to cite a single case invalidating, or even questioning, the type of deemed approval statute it challenges. WNG concedes that many states have similar provisions, and some have taken slightly different approaches. WNG Pet. at 15-17. The Petition discloses no instance of any such statute struck down on constitutional grounds. Simply put, WNG provides no reason why in this area, like others, states should not be free to establish their own procedures balancing the interests of utilities, ratepayers and others.

B. WNG Had No Property Interest Protected by State Law and Recognized under the Fourteenth Amendment

WNG argues that because its "right" to intervene in the KCC hearing was "grounded in state law, this right is a form of 'property' right to which due process protection must be given." WNG Pet. at 7. WNG must do more than simply assert it has some "right" under state law; it must show that it has an "individual entitlement" that the Fourteenth Amendment protects. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). WNG was granted its intervenor status based on general allegations concerning the "nature of its business" and the "affect [sic] . . . in the industry;" no "individual entitlement" was required or recognized. Indeed, KCC regulations expressly

negate WNG's argument that its intervenor status represented a recognition by the state that WNG had any "entitlement" or "property" interest:

> "Intervenor" means any person petitioning to intervene as provided by [Kan. Admin. Reg.] 82-1-225, when admitted by the commission as a participant in any proceeding. *Admission as an intervenor shall not be construed as recognition by the commission that the intervenor might be aggrieved by any order of the commission in the proceeding.*[28]

The power to grant intervention "enables the Commission to pursue a commendable liberal policy in permitting participation by parties desiring to intervene in commission proceedings." *Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n*, 473 P.2d 21, 30 (Kan. 1970). However, the intervenor's participation can be limited by the presiding officer "either at the time that intervention is granted *or at any subsequent time*." Kan. Admin. Reg. § 82-1-225(c) (emphasis supplied).

A procedural privilege that is liberally granted absent any showing of individual entitlement, and that can be subsequently limited at any time, is the very antithesis of a "property right."[29] Yet that is all that WNG had.[30]

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[28] Kan. Admin. Reg. § 82-1-204(i) (emphasis supplied). *See* 59 Am. Jur. 2d., *Parties*, § 129, at 583 (1987) ("A statute or rule relating to intervention is purely procedural and does not create substantive rights.") *See also* Kan. Stat. Ann. § 77-523(b) (Kansas Administrative Procedure Act provision allowing restriction of an intervenor's right to participate in an administrative hearing.)

[29] *See West Farms Assocs. v. Connecticut Traffic Comm'n*, 951 F.2d 469, 472-73 (2d Cir. 1991) (competitor's right to intervene in state proceeding does not create the "individual entitlement" necessary for a protected property interest); *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (*en banc*) ("[I]f state law establishes procedural entitlements, these are not themselves property and will not be enforced in the name of the Constitution.")

[30] *Logan v. Zimmerman Brush* provides no support for WNG's claims. *Logan* involved a plaintiff deprived of his own cause of

A long and unbroken line of cases from the state and federal courts holds that parties other than the utility itself have no property interest, and hence no right to a hearing or other due process, with respect to the utility's rates.[31] In *Harrison v. Long*, 734 P.2d 1155 (Kan. 1987), the Kansas Supreme Court confirmed that Kansas follows this long line of authority: "Interests which have been held not to be protected by the due process clause include . . . utility rates . . . ." *Id.* at 1159.[32] Thus, not only has WNG failed to cite any authority supporting its position, well-settled precedent squarely rejects it.

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action; WNG has no cause of action, and merely invoked a procedure to intervene in KPP's action. Logan also involved an employee's right to be free from discrimination involving his job; WNG has no right to be free from competition. *See Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 170 (1934) ("The Fourteenth Amendment does not protect a business against the hazards of competition.") Finally, while Logan had no opportunity to be heard, WNG was heard at length.

[31] *See, e.g., Wright v. Central Kentucky Natural Gas Co.*, 297 U.S. 537, 542 (1936) (natural gas customers have no vested rights in rates set by agreement between city and utility); *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 318 (1933) ("No one has a legal right to the maintenance of an existing rate or duty."); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1202 (2d Cir. 1987) ("[T]he New York courts have repeatedly held that state law creates no property interest in rates to be paid for services to be provided in the future, even where, as here, a statute or regulation requires that such rates be reasonable."); *Crosby v. City of Jackson*, 813 F. Supp. 476, 477-78 (S.D. Miss.) (following "numerous cases holding that consumers do not have a protected property interest in utility rates encompassed within the scope of 'life, liberty or property' under the Fourteenth and Fifth Amendments"), *aff'd mem.*, 5 F.3d 528 (5th Cir. 1993); *Sellers v. Iowa Power & Light Co.*, 372 F. Supp. 1169, 1172 (S.D. Iowa 1974) ("utility customers have no vested rights in any fixed utility rates," citing numerous federal and state cases).

[32] This does not mean, however, that the utility itself lacks such an interest. *See Crosby*, 813 F. Supp. at 480 n.6 ("[T]he law has recognized a difference between a utility's interest (as a seller) in a specific rate and the interest of a consumer in a specific rate.")

It is also plain that Kansas law does not create any right to a hearing or to a "decision on the merits," as WNG contends. Section 66-117 provides that the KCC "may hold a hearing;" it imposes no mandatory hearing requirement. And far from granting any party the right to a "decision on the merits," the statute expressly contemplates that there may be no decision, and that the "deemed approval" provisions will take effect. Kansas has simply neither created nor recognized the "right" WNG asserts; nor does the Constitution require that Kansas do so.[33]

C. Even if WNG Had a State-Created Right to a Hearing, which it Did Not, the Right Would Not Be a Protected Property Interest under the Fourteenth Amendment

Even if the state had granted WNG a "right" to a hearing or to a "determination on the merits," the right would not be protected under the Fourteenth Amendment. As this Court has made clear,

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.[34]

WNG's failure to identify any such substantive interest would be fatal to its due process claims even if it did have a right to a hearing or decision.[35] In any event,

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[33] The "right" WNG asserts is also inconsistent with the Kansas Constitution, which provides that the KCC's rate proceedings are legislative, not judicial or quasi-judicial, acts. *Midwest Gas Users Ass'n v. Kansas Corp. Comm'n*, 623 P.2d 924, 929 (Kan. Ct. App. 1981) ("Under the constitutional separation of powers, the regulation of public utilities is legislative in nature. . . . [W]hen acting in the exercise of its delegated powers, the Commission is not a quasi-judicial body.")

[34] *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

[35] *See Doe v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996) (state-created procedures do not create a claim of entitlement where none would otherwise exist); *Gagliardi v. Village of Pawling*,

WNG was heard at length before the KCC, and had every opportunity to urge its positions to the KCC and to the Kansas courts. The matter was decided by application of law. WNG's position now that it was denied "notice" and a "hearing" is, in light of the history of this case, absurd.

CONCLUSION

For the foregoing reasons, WNG's petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 19, 1996

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18 F.3d 188, 193 (2d Cir. 1994) ("The deprivation of a procedural right to be heard, however, is not actionable when there is no protected right at stake."); *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1117 (10th Cir. 1991) ("[T]he classification by the state of the particular procedure due the applicant is insufficient, in itself, to bring that interest within the protection of the Due Process Clause.")

APPENDIX

APPENDIX

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

No. 96-75918-A

KANSAS PIPELINE PARTNERSHIP,
Petitioner,

v.

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,
Respondent.

You are hereby notified of the following action taken by the Court:

Motion for Rehearing En Banc by Willliams Natural Gas Company.

Denied.

KCC Docket Nos. 192,506-U and 192,507-U

Date: 07/03/96.

CAROL G. GREEN
Clerk